Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1173

HAROLD W. FOLLETTE, Warden of Green Haven Prison
Stormville, New York,

Petitioner,

against

JOSE BURGOS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office & P. O. Address
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOEL LEWITTES
Assistant Attorney General
of Counsel

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Petitioner, the Warden of Green Haven Prison, Stormville, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Jose Burgos* v. *Follette*. Petition for rehearing was denied on December 13, 1971.

Citations to Opinions Below

The memorandum-opinion of the United States District Court for the Southern District of New York dismissing respondent's application for a writ of habeas corpus without a hearing is reproduced as Appendix "A" to the petition. The opinion of the United States Court of Appeals for the Second Circuit reversing the order of the District

Court and remanding the case for a hearing is reported at 448 F. 2d 130 and is annexed to this petition as Exhibit "B." The denial below of petitioner's application for rehearing is reproduced as Appendix "C" to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Is a criminal defendant entitled under this Court's ruling in *Procunier* v. *Atcheley* (400 U.S. 446) to a *Jackson* v. *Denno* hearing where the only objections entered by him at his *pre-Miranda-Escobedo* trial with respect to the admission of his confession into evidence were that (a) he was not warned of his right to remain silent and (b) he was 16 years old?

Statement of Case

Respondent was convicted in the former Court of General Sessions in New York County of the crime of murder in the first degree as a felony murder after a jury trial and on June 22, 1962, was sentenced to life imprisonment upon the recommendation of the jury.

No appeal was taken from the judgment of conviction.

In September of 1965, respondent sought a writ of error coram nobis in which he sought a *Jackson* v. *Denno* hearing to determine the voluntariness of the confessions introduced into evidence against him at trial. That application was denied by the Trial Court on February 1, 1967.

Thereafter, in 1967, respondent again sought the same relief and that application was also denied by the trial judge on March 13, 1968.

On appeal the denials of both these applications were unanimously affirmed by the State Appellate Division, First Department, 31 AD. 2d 601, 295 N.Y.S.2d 407.

Respondent thereafter commenced a federal habeas corpus proceeding in the District Court again raising the issue of an involuntary confession and by order dated October 21, 1969 the petition was disinissed without a hearing (PALMIERI, D.J.), on the grounds that: (1) Respondent's claims of police coercion were unsupported and conclusory (respondent on the trial did not challenge the testimony of the police officers relating to the circumstances attending his confession); (2) there was no showing of any prejudice in the time lag between respondent's initial apprehension and confession and that in any event the delay was reasonable and (3) that the age of respondent and his alleged English language disability were not sufficient, standing alone, to warrant a hearing.

In reversing the District Court order and remanding the case to the District Court for a hearing the Court below held that if it could be established at a hearing that respondent who was 16 years old at the time of the commission of the crime and had completed the eighth grade but read on a third level and spoke little English did in fact (although no such issues were raised in the State Trial Court) ask to call his family and was refused, was denied food and water until he made a statement and had his mother turned away by the authorities then respondent's confession was fatally tainted. *United States ex rel. Burgos v. Follette*, 448 F.2d 130 (2d Cir.) (Lumbard, C.J. *dissenting*).